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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. _____

STATE OF NEVADA,

Petitioner,

v.

UNITED STATES OF AMERICA, CECIL D. ANDRUS, Secretary of Interior, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Richard H. Bryan
Attorney General of
the State of Nevada

Larry D. Struve
Chief Deputy Attorney
General

Harry W. Swainston
Deputy Attorney
General
Heroes Memorial
Building
Carson City, Nevada 89710
Council for Petitioners

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The State of Nevada prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on September 18, 1980.

QUESTIONS PRESENTED

Whether The State of Nevada Has A Valid Claim As A Matter of Law To Dominion And Sovereignty Over The Lands Submerged By The Navigable Waters Of Pyramid Lake.

Whether The Defense Of Sovereign Immunity Prevents The United States District Court From Assuming Jurisdiction To Decide A Case Brought By The State Of Nevada To Establish The State's Claim Of Dominion And Sovereignty Over The Beds And Waters Of Pyramid Lake.

PARTIES TO THE PROCEEDINGS

At the time the State of Nevada appealed the dismissal of the action by the District Court to the Ninth Circuit Court of Appeals the following parties were named as defendants-appellees:
The United States of America, Cecil D. Andrus, Secretary of Interior, Morris Thompson, Commissioner of the Bureau of Indian Affairs, and Robert Hunter, Superintendent of Western Nevada Agency.

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OPINION BELOW

The opinion of the court below (Appendix A) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 18, 1980, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The federal statutes involved in this case are set forth in Appendix B.

STATEMENT OF THE CASE

This was an action brought by the State of Nevada to challenge the ouster of the State's Department of Fish and Game from exercising fish and game jurisdiction on the waters of Pyramid Lake, a navigable body of water surrounded by the Pyramid Lake Indian Reservation.

In the summer of 1976, members of the Pyramid Lake Paiute Tribe of Indians, with the concurrence of the federal officials named in the action below demanded that the officials of Nevada's Department of Fish and Game leave Pyramid Lake and not return. To avoid a confrontation which may have resulted in serous injury the Nevada Department of Fish and Game acceded to their demands.

The relevant portions of the historical record containing the facts material to the consideration of the questions presented occurred in the period from 1859 to 1874.

The actions complained of involve the interpretation which the Government placed upon certain actions of the Commissioner of Indian Affairs and the Commissioner of the General Land Office relative to the withdrawal from the public domain of certain lands in northwestern Nevada for the Pyramid Lake Indian Reservation in 1859.

On November 29, 1859, the Commissioner of Indian Affairs, A.B. Greenwood, upon the suggestion an Indian Agent, Fredrick Dodge, that certain lands be set aside for Indian reservations, wrote a letter to the Commissioner of the General Land Office, S.A. Smith, requesting that a certain tract of land now generally associated with the Pyramid Lake Indian Reservation be respected upon the eventual survey plats and upon the books of the local Land Office. On December 8, 1859, the Commissioner of the General Land Office, S.A. Smith wrote to Samuel C. Stambaugh, Surveyor General for the Utah Territory and advised him to reserve two tracts of land for Indian purposes indicated by the pink shade on an enclosed map. These letters are generally relied upon as initiating the Pyramid Lake Indian Reservation.

On October 31, 1864 the State of Nevada was admitted into the Union on an equal footing with the other states in all respects whatsoever. At the time

of statehood the state of Nevada was vested with title to the beds of all bodies of navigable water within its boundaries under the equal footing doctrine.

On March 23, 1874, President U.S. Grant, by executive order, legally established the Pyramid Lake Indian Reservation according to the Eugene Monroe survey of 1865.

The State filed the action in the District Court on December 8, 1976 against the federal officials. The federal defendants filed a motion to dismiss the State's Complaint, and on May 18, 1977 the District Court granted the Motion to Dismiss on the ground that the United States was an indispensible party and it had not been named. The District Court granted the State leave to file an amended complaint which the State did on June 1, 1977. Again, the federal officials and the United States filed a Motion to Dismiss. Again, on October 18, 1977 the District Court granted the motion on the grounds that the sovereign immunity of the United States had not been waived and that the Court thus lacked jurisdiction over the subject matter of the suit. The Court further found and concluded that the suit could not proceed against the federal defendants alone.

On September 18, 1980 the Ninth Circuit Court of Appeals upheld the District Court's dismissal based upon the absence of waiver of sovereign immunity.

REASONS FOR GRANTING THE WRIT

I. THE STATE OF NEVADA HAS A

VALID CLAIM AS A MATTER OF LAW TO DOMINION AND SOVEREIGNTY OVER THE LANDS SUBMERGED BY THE NAVIGABLE WATERS OF PYRAMID LAKE.

Upon admission into the Union of States the State of Nevada was automatically vested as a constitutional grant with absolute title to the beds of navigable waters within her borders under the equal footing doctrine. See e.g. Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977); Shively v. Bowlby, 152 U.S. 1 (1894); Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845).

The presumption in title disputes concerning the ownership of beds of navigable waters is that such lands are owned by the State in which they are located. See United States v. Oregon, 295 U.S. 1, 14 (1935). The presumption can only be refuted by clear and convincing evidence that Congress intended to dispose of such lands during the territorial period as expressed in a statute or a treaty. See United States v. Holt State Bank, 270 U.S. 49, 55 (1926) wherein this Court stated:

> "The United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the benefit of future States, and so has refrained from making any disposal, thereof, save in exceptional instances when impelled to particular disposals by some international duty or

> public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain."

The Pyramid Lake Indian Reservation surrounds Pyramid Lake, a circumstance almost identical to the Red Lake Indian Reservation in United States v. Holt State Bank, supra, wherein this Court recognized at 58 that:

> "There is nothing in this which even approaches a grant of rights in lands underlying navigable waters, nor anything evincing a purpose to depart from the established policy, before stated, of treating such lands as held for the benefit of the future State. Without doubt the Indians were to have access to the navigable waters and to be entitled to use them in accustomed ways; but these were common rights vouchsafed to all, whether white or Indian. . . ."

The Pyramid Lake Indian Reservation is an executive order reservation. See e.g. United States v. West Walker Irr. Dist., 104 F.2d 334, 338 (9th Cir. 1939). Prior to President Grant's Executive Order of March 23, 1874 formally establishing the Reservation, putative reservation status existed only by virtue of whatever legal effect

may be afforded the letters of the Commissioner of Indian Affairs and the Commissioner of the General Land Office in the latter part of 1859 which suggested the desirability of creating a reservation for the Paiute Tribes and which initiated the administrative process which culminated in the executive order in 1874.

In United States v. Leathers, 26 Fed. Cas. 897 (1879) Judge Hillyer specifically determined that the Pyramid Lake Indian Reservation was established on March 23, 1874, ten years after Nevada was admitted to statehood. The bed of Pyramid Lake could not therefore have been included within the reservation. See Taylor v. United States, 44 F.2d 531, 535 (9th Cir. 1930); see also Borax Ltd. v. Los Angeles, 296 U.S. 10 (1935).

A claimed Executive authority relative to the withdrawal of the beds of navigable waters during the territorial period was addressed and denied in the case of United States v. Ashton, 170 Fed. Rep. 509 (Cir. Ct. W.D. Wash. 1909), appeal dismissed 220 U.S. 604 (1910). In United States v. Ashton, the Circuit Court for the Western District of Washington stated a well established rule of law that:

> "The Oregon country was acquired by the United States, with the object in view of creating new states admitted into the Union upon an equality with the original states, and, until the states now existing within that country were organized and admitted into the Union, the national

> government held the title to the shores and beds of navigable waters therein, as trustee for the future states. Pollard v. Hagan, 3 How. 212, 11 L.Ed. 565. If there is any exception to this general rule, it must rest upon a special grant expressly authorized by a law enacted by Congress to provide for some peculiar requirement of the national government. Shively v. Bowlby, 152 U.S. 1, 14 Sup. Ct. 548, 38 L.Ed. 331." 170 Fed. Rep. at 513. (Emphasis added.)

The Court then applied this principle in denying the claimed Executive authority as follows:

> ". . .[T]he President could not grant the shore lands by the making of an executive order designating the tract of land to be held as a reservation. . ." 170 Fed. Rep. at 517.

This Court dismissed the appeal in Bird et al. v. Ashton, 220 U.S. 604, citing Shively v. Bowlby, 152 U.S. 1, a landmark submerged lands case, and Goodrich v. Ferris, 214 U.S. 71, 81 (1909) upon the following basis:

> ". . .[W]here the alleged Federal question is so wanting in merit as to cause it to be frivolous or without any support whatever in reason, it follows that the appeal must be and it is Dismissed for want

of jurisdiction."

Thus, when this Court considered the appeal which raised the issue whether the Executive had the authority to withdraw beds of navigable waters for Indian reservation purposes during the territorial period as the United States has contended before the Ninth Circuit Court of Appeals and the Court has apparently so held in the instant case, this Court held that the appeal was so wanting in merit as to require dismissal. Furthermore, this Court's dismissal in Ashton was entirely consistent with later pronouncements such as United States v. Holt State Bank, supra.

Although the Ninth Circuit Court of Appeal's opinion glossed over the question of the validity of the claim of ownership of Pyramid Lake advanced by the United States, the Court nevertheless denied Nevada's right to have the claim litigated. Implicit in the Court's ruling, therefore, was the implication that the United States advanced at least a colorable claim of title. Such recognition was a minimum requirement to permit the Court to apply the statute of limitations exception to the waiver of sovereign immunity contained in 28 U.S.C. §2409a.

The Ninth Circuit Court of Appeals in an implicit recognition of a colorable claim of the United States to ownership of Pyramid Lake failed to notice important details relative to the establishment of the Pyramid Lake Indian Reservation. In United States v. Southern Pacific Transportation Co., 543 F.2d

676, (9th Cir. 1976) the Ninth Circuit Court of Appeals citing 1 C. Kappler, Indian Affairs Laws and Treaties 869, noted that the formal establishment of Walker River Indian Reservation occurred in 1874. The establishment of the Pyramid Lake Indian Reservation was based upon the same letters of the Commissioner of Indian Affairs and the Commissioner of the General Land Office. These letters were set forth by Kappler at 868 - 869. The following caption appears in brackets in connection with the Pyramid Lake Reserve:

> "In Nevada Agency; occupied by Paiute; area, 503 1/4 square miles."

This Court may take notice that 503 1/4 square miles is equivalent to 322,080 acres; the latter figure as rounded to the nearest thousand acres is the figure reported to Congress in 1950 as the original area of the reservation in a report prepared for Congress with respect to The House Resolution Authorizing The Committee On Interior And Insular Affairs To Conduct An Investigation Of The Bureau Of Indian Affairs, pursuant to H. Res. 698 (82nd Congress). At page 899 of the report it is stated with respect to the Pyramid Lake Indian Reservation:

> "The original area was 322,000 acres. In 1950 the area consisted of 475,162 acres (475,140 acres tribal including 130,000 acres of lake surface, 22 acres reserved by the government).

> An executive order of March 23, 1874 set lands apart for the Pyramid Lake Reservation in Nevada for Paiute and other Indians residing thereon."

Kappler's report was published in 1904 under the auspices of the Senate Committee on Indian Affairs.

In 1924 Congress indirectly recognized the validity of the State of Nevada's sovereign claim to Pyramid Lake. An Act of Congress dated June 7, 1924, 42 Stat. 596, states in pertinent part:

> "Section 3. That titles to lands in Pyramid Lake Indian Reservation acquired by patents heretofore issued by the United States to any railroad company, individual or the State of Nevada, or by certification to the State of Nevada, are hereby confirmed."

This provision was construed by the United States District Court in at least two cases, United States v. Garaventa Land & Livestock Co., 38 F.Supp. 191, 194 (1941) reversed on other grounds 129 F. 2d 416, and United States v. Depaoli, 47 F.Supp. 688, 689 (1942) reversed on other grounds, 139 F.2d 225. Both cases recognized the validity of the school lands grant of the 16th and 36th sections as provided for by the State's enabling act, 13 Stat. 30, Sec. 7. Because the school lands grant was operative at the moment of statehood the constitutional grant of the lands submerged by Pyramid Lake were necessarily validated as well.

Mr. John Collier, Commissioner

of Indian Affairs, explained why the the Act of June 7, 1924 was enacted in an appearance before the Senate Committee of Indian Affairs on May 21, 1943 when the Committee was conducting hearings (May 20 and 21, 1943) on S. 24, an Act To Authorize The Secretary Of The Interior To Issue Patents For Certain Lands To Certain Settlers In The Pyramid Lake Indian Reservation, Nevada, (78th Cong., 1st Sess.). Mr. Collier reported to the Committee at p. 54 that Congress acted in 1924 upon the theory advanced by Mr. Finney, then Acting Secretary of Interior under Secretary Fall, that the reservation had not originated until the Executive Order of 1874 and therefore State patents arising under the school land grant to the State should be validated.

In Senate Report No. 80 to accompany S.24, Calendar No. 79, 78th Congress, 1st Session, the Committee of Indian Affairs noted at page 3 in reviewing the November 29, 1859 letter of the Commissioner of Indian Affairs to the Commissioner of the General Land Office:

> "It can hardly be claimed that such letter legally set apart public lands, for the Indians. No authority exists for the Commissioner of Indian Affairs to set apart public lands for Indians or any other reservations. The three methods by which an Indian reservation can be created are (1) by treaty, (2) by act of Congress, and (3) by Executive Order. This is recognized in

> the act of February 8, 1887 (24 Stat. 388; 1 Kappler 33), and Spaulding v. Chandler (160 U.S. 394).
>
> * * *
>
> Therefore, it would appear that whatever rights the Piutes have date from the Executive order of March 23, 1874."

It is clear that since Nevada's admission into the Union the United States had not had the slightest claim to Pyramid Lake. In 1953 the Congress reaffirmed Nevada's title by the enactment of the Submerged Lands Act, 43 U.S.C. §1301, et seq. See 43 U.S.C. § 1311.

Additionally, Congress in effect validated the State of Nevada's claim to Pyramid Lake by provisions of the State's enabling act. Nevada was not required as a condition to admission to disclaim any interest in Indian reservation lands. This Court in United States v. McBratney, 104 U.S. 621, 623 (1881) established the following principle:

> "Whenever, upon admission of a State into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words."

Not having expressed an intention to reserve the bed of Pyramid Lake for Indian purposes as a condition of statehood, it is clear as a matter of

law that nothing prevented the constitutional grant of such lands from vesting title in the State of Nevada. See also, New York ex rel. Ray v. Martin, 326 U.S. 496 (1946). In Ward v. Race Horse, 163 U.S. 504 (1895) this Court held that because Wyoming's enabling act made no reservation whatever in favor of Indians, that hunting rights reserved by a treaty were repealed. Similarly, Nevada's enabling act necessarily repealed prior inconsistent administrative action which is relied on as a basis of the United States' claim to Pyramid Lake. Compare The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870).

This Court has observed that enabling acts providing for admission of a state into the Union on an equal footing with the original States in all respects whatever carried with them a grant of all the powers which the original States possessed over navigable waters within their borders. See e.g. Cardwell v. American Bridge Company, 113 U.S. 205, 212 (1884); Williamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888).

The Supreme Court of the State of Nevada held in 1915 that the waters of Pyramid Lake are undoubtably public waters belonging to the State in Ex Party Crosby, 38 Nev. 389, 394, 149 Pac. 989, 990 (1915). The Nevada Supreme Court considered the cases of Pollard's Lessee v. Hagan, supra, Shively v. Bowlby, supra, and correctly applied the legal principles announced in United States v. McBratney, supra. The Court also considered the cases of United States v. Leathers, 26 Fed. Cas. 897 (1879) and United States v. Sturgeon,

27 Fed. Cas. 1357 (1879) which when read together stand for the proposition that the Pyramid Lake Indian Reservation was established in 1874, ten years too late to prevent the transfer of Pyramid Lake into State ownership.

The State of Nevada submits that it has a valid claim to the ownership of the bed of Pyramid Lake as a matter of law. The lack of executive authority to include the Lake in an Indian reservation during the territorial period prevented the submerged lands from being withdrawn from the reach of the equal footing doctrine. An adherence by the federal officials named as defendants in the courts below to the notion that the United States has retained ownership of the bed of Pyramid Lake unconstitutionally infringes the sovereignty of the State of Nevada, is violative of the Submerged Lands Act and the constitutional grant to the State of Nevada, and is inconsistent with the intent of Congress in the Act of June 7, 1924 that whatever Indian rights attended the establishment of the Reservation, date from the Executive order of March 23, 1874.

In the Courts below the United States and the federal officials cited the case of United States v. Alaska, 423 F.2d 764 (9th Cir. 1970) for the proposition that an executive order reservation made prior to statehood can include the beds of navigable bodies of water. Although certiorari was denied on December 21, 1970, at 400 U.S. 967, before this Court acted to deny certiorari it made the following request set forth at 400 U.S. 815:

> "The parties are requested to file further memoranda on the following questions:
> (1) Must Congress authorize or ratify the withdrawal of territorial lands by the President?;
> (2) If so, did Executive Order No. 8979 have the necessary authorization or ratification?; and
> (3) Was the matter adequately raised below?;

The Memoranda of the parties reveals that the Executive withdrawal was authorized by Congress and Alaska conceded that such authorization was effectual to permit the President to make the withdrawal.

The instant case again raises the question posed by United States v. Alaska, supra, but which went unanswered in that case, that is, whether an Executive withdrawal or indeed simply a Departmental withdrawal of the beds of navigable waters during the territorial period without Congressional authorization or ratification was effective to remove such lands from the reach of the equal footing doctrine. The State submits that this question was emphatically answered in the negative when this Court denied the appeal in United States v. Ashton, supra, and Nevada respectfully requests that this Court grant certiorari to settle this important question.

The State of Nevada urges that

the untrammeled right of the States to their sovereign lands should be protected against unauthorized executive action during the territorial period and is an interest which should be clarified and confirmed.

II. THE DEFENSE OF SOVEREIGN IMMUNITY SHOULD NOT PREVENT THE UNITED STATES DISTRICT COURT FROM ASSUMING JURISDICTION IN A CASE BROUGHT BY THE STATE OF NEVADA TO ESTABLISH THE STATE'S CLAIM OF SOVEREIGNTY AND DOMINION OVER THE BEDS AND WATERS OF PYRAMID LAKE.

Where a sovereign State, such as Nevada herein, asserts not only the usual presumption that beds of navigable waters are within the sovereignty and dominion of the State within which they lie, but can establish that such lands have not been separated from such sovereignty and dominion as a matter of law, it is fundamental that wrongful acts of federal officials which cause the ouster of the State from an exercise of its sovereign functions with respect to such lands must be afforded a remedy in the federal district courts. The defense of sovereign immunity should not bar the vindication of the State's sovereign claims in a proper case in the federal district court.

Where the right to possession and enjoyment of property under the general law is in issue and the defendants claim as officers or agents of the sovereign the rule of United States v. Lee, 106 U.S. 196 (1882) permits judicial inquiry into their authority. Thus this Court held in Land v. Dollar, 330 U.S. 731, 736-737 citing

Lee that:

> ". . .[T]he assertion by officers of the Government of their authority did not foreclose judicial inquiry into the lawfulness of their actions; that a determinatin of whether their authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision on the merits of the question.'"

The Courts of Appeals have been led to similar conclusions. See e.g. West Coast Exploration Co. v. McKay, 213 F.2d 582, 592, cert. denied, 347 U.S. 307 (DCC Cir. 1954); Carter v. Seamans, 411 F.2d 767, 770 (5th Cir. 1969).

It is well settled that a federal court must take jurisdiction if it should. Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 404 (1821). In the instant case the District Court should have taken jurisdiction to determine the threshold issue of whether it had jurisdiction to proceed to a determination on the merits. See e.g. Harmon v. Brucker, 355 U.S. 579, 582 (1958).

Where as here the jurisdictional issue is so closely intertwined with the merits the two are inextricable. When confronted with such a case the procedure which is incumbent upon the district court is to proceed to a determination of the case on the merits. In the leading case of Land v. Dollar, supra, at 735, Justice Douglas recognized that there were types of

cases "where the question of jurisdiction is dependent on a decision of the merits." This Court held that the district court had "jurisdiction to determine its jurisdiction by proceeding to a decision on the merits." 330 U.S. 739. Justice Douglas dissenting in Gulf Oil Co. v. Copp Paving Co., 419 U.S. 186, 213 n. 10 (1975) took the opportunity to explain the preferred procedure:

> ". . .[W]here the district court's jurisdiction is challenged, that court has the power, either on its own motion or on the motion of a party, to inquire into the facts as they exist for purposes of resolving the jurisdictional issue. Land v. Dollar, 330 U.S. 731, 735 n. 4 (1947), and cases cited; Local 336, American Federation of Musicians v. Bonatz, 475 F.2d 433, 437 (CA 3 1973). On the other hand, if the jurisdictional issue is closely intertwined with or dependent on the merits of the case, the preferred procedure is to proceed to a determination of the case on the merits. McBeath v. Inter-American Citizens for Decency Comm., 374 F.2d 359, 362-363 (CA5) cert. denied, 389 U.S. 896 (1967); Jaconski v. Avisun Corp., 359 F.2d 931, 935-36 (CA3 1966)."

An identical procedure was adopted by the Ninth Circuit Court of Appeals in

Data Disc, Inc. v. Systems Tech. Assoc., Inc., 557 F.2d 1280, 1285 (9th Cir. 1977). This procedure is authorized by Rule 12(d) of the Federal Rules of Civil Procedure and has been adopted by every circuit that has addressed the question. See e.g. Spector v. L.Q. Motor Inns Inc., 517 F.2d 278, 284 (5th Cir. 1975); Firemans Fund Ins. Co. v. Railway Express Agency, 253 F.2d 780, 784 (6th Cir. 1968). W. McBeath v. Inter-American Citizens For Decency Committee, 374 F.2d 359, 362-63 (5th Cir. 1967); Schramm v. Oaks, 352 F.2d 143, 149 (10th Cir. 1965).

Although the State's pleadings and affidavits established a prima facia showing of jurisdictional facts, the District Court refused to consider the merits of the State's submitted materials or to permit the State an opportunity to offer additional proof relative to the jurisdiction of the Court. The State was therefore precluded from showing that the facts and the law do not establish a colorable claim of ownership of Pyramid Lake in the United States, and therefore, the federal defendants assertion of such title is ultra vires their authority and an unconstitutional infringement of the State's right. Had the Court addressed the merits of the State's claim it would have been apparent that the Court could assume jurisdiction in spite of the sovereign immunity defense under the exceptions to the doctrine announced by this Court in Larson v. Domestic & Foreign Corp., 337 U.S. 682 689-90 (1949). Thus, if the submerged lands claimed by the State could not conceivably be deemed included as a part of

the Pyramid Lake Indian Reservation from either a factual or legal basis it would be ultra vires their authority and unconstitutional for the named federal officials to claim they were Indian trust lands in derogation of the State's absolute title under the equal footing doctrine and jurisdiction would lie to review their actions.

Furthermore, as the State has pointed out herein, because as a matter of law the State's title cannot be denied, trust or restricted Indian lands are not involved and therefore the waiver of sovereign immunity contained in 28 U.S.C § 2409a in quiet title actions applies to vest the District Court with jurisdiction. The Court below conceded that Nevada may be right on this point which would render inapposite the Court's decision in Carlson v. Tulalip Tribes of Washington, 510 F.2d 1337 (9th Cir. 1975) if it were found as a preliminary jurisdictional fact that Indian trust lands were not involved. The Court ruled, however, that the question need not be reached because the statute of limitations section, 28 U.S.C. §2409a(f), prevents the applicability of the waiver of sovereign immunity statute.

The Court below mischaracterized the State's position with respect to the statute of limitations in so far as the Court limited the State's position to an argument that the statute of limitations pericd should began to run in 1972 when U.S.C. §2409a was passed.

As noted by the Court below, the State does contend and renews her argument that if a reasonable time is not given for the commencement of an

action after a statute of limitations period has been established by statute, the statute is "an unlawful attmept to extinguish rights arbitrarily, whatever might be the purport of its provisions." Wilson v. Iseminger, 185 U.S. 55, 62 (1902). See also Terry v. Anderson, 95 U.S. 628, 632 (1877); Lamb v. Powder River Livestock Co., 132 F. 434, 442 (8th Cir. 1904).

The State, however, contends that the statute of limitations period never really started to run because the United States has never had a colorable claim of title to Pyramid Lake. The 1877 resolution of the Nevada Legislature which the Court below suggested was an acknowledgment that the lake was in the reservation contained the following statement:

> "Said reservation was created by proclamation of the President. . ."

If indeed the reservation was created by the 1874 order of the President, it is a legal impossibility for the lake to be included in the reservation. An acknowledgment based upon an erroneous interpretation of law creates no legally enforceable claim which could be asserted by the United States nor should it start the running of the limitations period.

The reliance placed upon the case of United States v. Sturgeon, 27 Fed. Cas. 1357, No. 16,413 (D. Nev. 1879) by the Court below is similarly misplaced. In a companion case, United States v. Leathers, 25 Fed. Cas. 897, (D. Nev. 1879) decided the same day as Sturgeon there was an express finding

that the Pyramid Lake Indian Reservation was established on March 23, 1874 making the inclusion of the lake in the reservation impossible as a matter of law.

Because the United States did not have a viable claim to Pyramid Lake for Indian purposes, the beds of the lake were not excepted from the provisions of the Submerged Lands Act of 1953. See 43 U.S.C. §1313. Therefore the Act confirmed the State's title and rendered such title immune from adverse claims following 1953.

The upshot of the historical and legal record is simply that because there never has been a claim by the United States to the bed of Pyramid Lake the statute of limitations exception to the waiver of sovereign immunity 28 U.S.C. § 2409a(f) simply is not applicable. There could be no time in which the State "knew or should have known of the claim of the United States."

In addition to the waiver of sovereign immunity implicit in the Larson exceptions and the express waiver in 28 U.S.C. §2409a, the State relies upon 5 U.S.C. §702 as a blanket waiver of sovereign immunity to permit the federal courts to review claims of wrongful conduct by federal agency action where there is an independent jurisdictional foundation. The State has supplied the jurisdictional foundation setting forth as jurisdictional bases, inter alia, the federal question provision of 28 U.S.C. §1331 and the Mandamus and Venue Act, 28 U.S.C. §1361. In Califano v. Sanders, 430 U.S. 99, 106

n.6 (1977) this Court made clear that where there is a "court specified by statute" or a "court of competent jurisdiction" a person wronged by agency action is entitled to judicial review under 5 U.S.C. § 702.

The correctness of the decision below insofar as it went is open to serious question. Additionally, however, the Court failed to address substantial arguments advanced by the State, particularly, the applicability of the Larson exceptions to the sovereign immunity defense and the applicability of 5 U.S.C § 702 which Nevada contended were proper bases to predicate district court jurisdiction.

CONCLUSION

For the reasons presented, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit. Presently pending before the Court is the case of Montana v. United States et al., No. 79-1128 which raises the question of the effect that certain treaties had with respect to the withdrawal of the Big Horn River within the Crow Reservation during the territorial period. This case presents a similar question with the exception that executive action rather than treaties are involved.

Respectfully submitted,

Richard H. Bryan
Attorney General for
Nevada

Larry D. Struve
Chief Deputy
Attorney General

Harry W. Swainston
Deputy Attorney
General
Heroes Memorial
Building
Capitol Complex
Carson City, Nevada 89710

Counsel for Petitioner

APPENDIX

APPENDIX A

OPINION BELOW

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF NEVADA,	)	No. 78-1185
	)	
Plaintiff-Appellant,	)	MEMORANDUM
	)	
v.	)	(R-76-235-BRT)
	)	
UNITED STATES OF AMERICA, CECIL D. ANDRUS, Secretary of the Interior et al.,	)	(Argued and Submitted April 15, 1980) Filed Sept. 18, 1980, Richard H. Deane, Clerk U.S. Court of Appeals
	)	
Defendants-Appellees	)	
	)	
	)	
	)	

Appeal from the United States District Court for the District of Nevada
Bruce R. Thompson, District Judge, Presiding

Before: TUTTLE*, SKOPIL and SCHROEDER, Circuit Judges

This is an action by the State of Nevada against the United States to quiet title to the bed of Pyramid Lake. The trial court dismissed the action on grounds of sovereign immunity and in this appeal the Government defends the dismissal both on immunity and statute of limitations grounds.

The merits of Nevada's claim involve its contention that the reservation which surrounds Pyramid Lake was not validly reserved to the United States before Nevada was admitted to the

Union, and that therefore the rights to the lake bed were transferred to the state upon admission. Nevada appeals the dismissal on the ground that the trial court should have examined the merits of the case to determine whether or not the claimed lake bed is Indian land.

That position is contrary to this Court's decision in Carlson v. Tulalip Tribes of Washington, 510 F.2d 1337 (9th Cir. 1975), which held that where the land which is the subject of the dispute is claimed by the Government to be Indian land, the Government is immune from suit because the Quiet Title Act "does not apply to trust or restricted Indian lands." 28 U.S.C. 2409a.

Even if Nevada is correct in arguing that an action under the Quiet Title Act may not be dismissed on immunity grounds until the district court determines that the land is Indian land, Nevada's suit in this case is barred by the statute of limitations. The Quiet Title Act, 28 U.S.C. § 2409a(f) provides that any action against the government must be filed within twelve years of the date on which it accrued. Nevada does not dispute the applicability of the statute of limitations to its claim. Rather, it argues that the twelve year limitation period should begin to run in 1972, when the statute was passed. This argument, however, has been expressly rejected by this Court in Groscz v. Andrus, 556, F.2d 972 (9th Cir. 1977), and that decision is controlling here.

Under Groscz, the crucial question is whether the plaintiff knew or should have known of the government's

claim more than twelve years before the action was filed. In this case Nevada should have known that the government regarded the land as reservation land since the 19th century. The reservation was established in 1859, and formally recognized by Presidential Order in 1874. Executive Orders Relating to Indian Reservations, from May 14, 1855, to July 1, 1912 at 113-14 (1912). In 1877 the Nevada Legislature passed a resolution which acknowledged that the lake was in the reservation. Joint Memorial and Resolution of Jan. 29, 1877, 1877 Nev. Stat. at 215. Moreover, in 1879, a federal court stated that the lake was in the reservation. United States v. Sturgeon, 27 Fed. Cas. No. 16,413 (D. Nev. 1879).

Affirmed.

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* Honorable Elbert Parr Tuttle, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

APPENDIX B

FEDERAL STATUTES INVOLVED

5 U.S.C. § 702

Right of review:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States:

Provided , That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground: or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Pub.L. 89-554, Sept. 1966, 80 stat. 392;

Publ.L. 94-574 §1, Oct. 21, 1976 90 Stat. 2721.

28 U.S.C. §2409a

Real property quiet title actions (a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1951, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession of control.

(c) The complaint shall set forth with

particularity the nature of the right, title or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

(d) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346 (f) of this title.

(e) A civil action against the United States under this section shall be tried by the court without a jury.

(f) Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(g) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

Added Pub.L. 92-562, §3(a), Oct. 25, 1972, 86 Stat. 1176.

28 U.S.C. §1331

Federal question; amount in controversy;

costs;

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value, shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.
As amended Oct 21, 1976, Pub.L. 94-574, §2, 90 Stat. 2721.

28 U.S.C. § 1361

Action to compel an officer of the United States to perform his duty;

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.
Added Pub.L. 87-748, § 1(a), Oct. 5, 1962, 76 Stat. 744.

43 U.S.C. § 1311

Rights of the States

(a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use

It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) Release and relinquishment of title and claims of United States; payment to States of moneys paid under leases.

(1) The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title and interest of the United States, if any it has in and to all said lands, improvements, and natural resources; (2) the United States releases and relinquishes all claims of the United States, if any it has, for money or damages arising out of any operations of said States or persons pursuant to State authority upon or within said lands and navigable waters;

and (3) the Secretary of the Interior or the Secretary of the Navy of the Treasurer of the United States shall pay to the respective States or their grantees issuing leases covering such lands or natural resources all moneys paid thereunder to the Secretary of the Interior or to the Secretary of the Navy or to the Treasurer of the United States and subject to the control of any of them or to the control of the United States on May 22, 1953, except that portion of such moneys which (1) is required to be returned to a lessee; or (2) is deductible as provided by stipulation or agreement between the United States and any of said States;

43 U.S.C. § 1313

Exceptions from confirmation and establishment of States' title, power and rights

There is excepted from the operation of section 1311 of this title

* * *

(b) such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians;

May 22, 1953, ch. 65, title II, §5, 67 Stat. 32.

Federal Rules of Civil Procedure, Rule 12d.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trail on application of any party, unless the

court orders that the hearing and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.